Bangkok Bank Bhd v Chuan Kee Co Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS S2–24–868–1999
KAMALANATHAN RATNAM J
20 DECEMBER 1999

Land Law *— Charge — Order for sale — Application for — Failure to comply with statutory notice of demand — Inclusion of claim for legal fees; whether fatal — Notice of demand not been fully served; whether defendant still liable to pay — Failure to provide breakdown of amount outstanding — Charge inconsistent with amount claimed; whether plaintiff can rely upon conclusive evidence clause — Whether 'cause to contrary' proved — National Land Code 1965 s 256(3) — Rules of the High Court 1980 O 59 r 3(1) & O 83 r 3(3)*

The defendant was the registered proprietor of certain lands ('the properties'). The plaintiff had approved banking facilities to the defendant totalling RM3,700,000. The defendant created a first legal charge over the properties in favour of the plaintiff. The defendant defaulted in payment to the plaintiff. The plaintiff then demanded payment by way of a demand notice dated 12 January 1999 which included legal fees of RM2,745. A statutory notice in Form 16D of the National Land Code 1965 ('the NLC') was served on the defendant for the same amount as was contained in the earlier notice of demand. The defendant failed to comply with the statutory notice of demand. The plaintiff moved the court for an order for sale with consequential prayers claiming an indebtedness by the defendant as at 30 April 1999 a sum of RM4,055,691 with accrued interest. Relying on the conclusive evidence clause as contained in the charge, the plaintiff prayed for an order in terms of the originating summons. The defendant argued: (i) including a claim for legal fees was fatal when attempting to obtain an order for sale pursuant to s 256(3) of the NLC, relying on O 59 r 3(1) of the Rules of the High Court 1980 ('the RHC'); (ii) the notice of demand dated 12 January 1999 had not been fully served; (iii) the plaintiff had failed to provide a breakdown of the amount outstanding and thereby breaching O 83 r 3(3) of the RHC; and (iv) the charge was inconsistent with the amount claimed and it was not in order for the plaintiff to rely upon the conclusive evidence clause in the face of such error.

Held, allowing the plaintiff's application:

(1) Section 268(1)(c) of the NLC refers to 'the total amount due under the charge at the time of the sale'. The words 'total amount' would indicate all sums that the plaintiff had to expend as at the time of the sale and this must necessarily include the legal fees. Whilst the RHC has made provisions for costs to be taxed in respect of proceedings pursuant to an order of the court, it is now clear that an order for sale when made under s 256 of the NLC is

not a judgment or a decree. Therefore, it is conclusive that O 59 r 3(1) of the RHC had no place in proceedings under s 256 of the NLC. The legal expenses were not expenses within the ambit of O 59 r 3(1) since proceedings pursuant to s 256 of the NLC were not proceedings within the meaning of O 59 r 3(1) and also considering the fact that these expenses amounting to RM2,745 had been incurred long before the filing of the originating summons. In any case, the sum was included in the notice of demand dated 12 January 1999 and the defendant had failed to make any challenge at that stage even to the amount. In the circumstances, both on principle and on law, the plaintiff was entitled to include its claim for legal costs incurred prior to the filing of the originating summons in a claim made pursuant to s 256 of the NLC (see p 120D–I); *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119 followed.

(2) A notice of demand is not a prerequisite to a charge action. Therefore, whether the notice of demand was sent by ordinary post or otherwise or even if the defendant did not even receive it, is of no consequence. The onus was on the defendant to pay, whether demand was made or not, when the sums fall due for payment (see p 121F–G).

(3) The plaintiff had clearly given the details of the amount claimed as set out in the affidavit in support of the application and in the further affidavit. The defendant did not give any particulars of whichever sum it was challenging nor did the defendant give any evidence whatsoever that the sums claimed by the plaintiff were wrong in any material particular. The defendant was not correct in suggesting that all the statutory particulars must be included in the first affidavit in respect of foreclosures. Having perused the further affidavit by the plaintiff, the court was satisfied that there had been sufficient compliance with the requirement of O 83 r 3 of the RHC (see p 123B–D, F, H).

(4) The defendant did not raise the issue that the charge was inconsistent with the amount claimed in its affidavit in reply. On this ground alone, the court ought to reject this issue on the basis that it was not specifically taken as an issue in the affidavit (see p 124G–H).

(5) However, even if it was raised, the court would have rejected it. According to the charge, the defendant was liable even if the amount was not secured by the charge. There was nothing in the annexure which provided that the total principal sum shall not exceed RM3,700,000. The defendant was the borrower and the beneficiary of the loan and could not deny knowledge of the total loan. What is important is that there was no evidence to show that the amount claimed was incorrect. Based on authority, the court accepted the plaintiff's reliance upon the conclusive evidence clause (see pp 124H, 125C–D, H).

(6) The court was satisfied that the annexure to the charge had provided for all the relevant terms and conditions in the schedule. The charge had provided for all the sums claimed by the plaintiff in the originating summons. In the circumstances, no 'cause to the contrary' had been shown (see p 127E–F).

[Bahasa Malaysia summary

Defendan adalah tuan punya berdaftar beberapa bidang tanah ('harta tanah tersebut'). Plaintif telah meluluskan kemudahan perbankan kepada defendan berjumlah RM3,700,000. Defendan telah mewujudkan gadaian yang pertama ke atas hartanah-hartanah yang berpihak kepada plaintif. Defendan telah ingkar di dalam pembayaran ke atas plaintif. Kemudian plaintif menuntut pembayaran melalui notis tuntutan bertarikh 12 Januari 1999 yang termasuk bayaran guaman sebanyak RM2,745. Suatu notis statutori di dalam Borang 16D Kanun Tanah Negara 1965 ('KTN') telah diserahkan kepada defendan untuk jumlah yang sama seperti yang terkandung di dalam notis tuntutan yang terdahulu. Defendan gagal untuk mematuhi notis tuntutan statutori tersebut. Plaintif memohon kepada mahkamah untuk suatu perintah jualan dengan perintah-perintah lain untuk tuntutan hutang oleh defendan pada 30 April 1999 sebanyak RM4,055,691 dengan faedah terakru. Bergantung kepada fasal-fasal keterangan konklusif seperti yang terkandung di dalam gadaian tersebut, plaintif telah memohon untuk perintah seperti dipohon di dalam saman pemula. Defendan berhujah: (i) memasukkan tuntutan untuk bayaran guaman adalah memudaratkan apabila cubaan untuk memperolehi perintah jualan menurut s 256(3) KTN, bergantung kepada A 59 k 3(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'); (ii) notis tuntutan bertarikh 12 Januari 1999 belum lagi diserahkan sepenuhnya; (iii) plaintif gagal untuk membekalkan butiran jumlah yang tertunggak dan dengan itu melanggar A 83 k 3(3) KMT; dan (iv) gadaian tersebut adalah tidak konsisten dengan jumlah yang dituntut dan ia tidak teratur bagi plaintif bergantung kepada fasal keterangan konklusif memandangkan kesilapan tersebut.

Diputuskan, membenarkan permohonan plaintif :

(1) Seksyen 268(1)(c) KTN merujuk kepada 'jumlah penuh yang terhutang di bawah gadaian pada masa jualan'. Perkataan-perkataan 'jumlah penuh' akan menunjukkan semua jumlah yang plaintif terpaksa gunakan pada masa jualan tersebut dan ini mesti termasuk yuran guaman. Walaupun KMT telah membuat peruntukan-peruntukan untuk kos ditetapkan berkenaan dengan prosiding-prosiding menurut perintah mahkamah, adalah jelas bahawa suatu perintah jualan apabila dibuat di bawah s 256 KTN bukanlah suatu penghakiman atau dikri. Oleh itu, adalah

konklusif bahawa A 59 k 3(1) KMT tidak mempunyai tempat di dalam prosiding di bawah s 256 KTN. Perbelanjaan guaman bukanlah perbelanjaan di dalam lingkungan A 59 k 3(1) oleh kerana prosiding-prosiding menurut s 256 KTN bukanlah prosiding-prosiding dalam maksud A 59 k 3(1) dan juga memandangkan fakta bahawa perbelanjaan-perbelanjaan tersebut yang terjumlah kepada RM2,745 telah lama dikenakan sebelum pemfailan saman pemula. Walau apa sekalipun, jumlah tersebut dimasukkan di dalam notis tuntutan bertarikh 12 Januari 1999 dan defendan telah gagal untuk mencabar di peringkat tersebut walau sekalipun kepada jumlahnya. Di dalam keadaan-keadaan tersebut, di atas prinsip dan juga undang-undang, plaintif berhak untuk memasukkan tuntutannya untuk kos guaman yang ditanggung sebelum pemfailan saman pemula di dalam tuntutan yang dibuat menurut s 256 KTN (lihat ms 120D–I); *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119 diikut.

(2) Suatu notis tuntutan bukanlah prasyarat untuk suatu tindakan gadaian. Oleh itu, sama ada notis tuntutan dihantar melalui pos biasa atau sebaliknya atau walau sekalipun defendan tidak menerimanya, ia tidak memudaratkan langsung. Beban adalah di atas defendan untuk membayar, tidak kira sama ada tuntutan dibuat atau tidak, apabila jumlah tersebut kena dibayar (lihat ms 121F–G).

(3) Plaintif telah dengan jelas memberikan butir-butir jumlah tersebut yang dituntut seperti yang terbentang di dalam afidavit sokongan permohonan tersebut dan di dalam afidavit lanjutan. Defendan tidak memberikan apa-apa butir jumlah yang mana ia mencabar atau memberikan sebarang keterangan apa-apa sekali pun bahawa jumlah yang dituntut oleh plaintif adalah salah dari segi sebarang butir yang material. Defendan tidak betul di dalam mencadangkan bahawa semua butir-butir statutori dimasukkan di dalam afidavit pertama berkenaan dengan halang tebus-halang tebus tersebut. Selepas melihat afidavit lanjutan oleh plaintif, mahkamah berpuas hati bahawa terdapat pematuhan yang mencukupi dengan keperluan A 83 k 3 KMT (lihat ms 123B–D, F, H).

(4) Defendan tidak membangkitkan isu bahawa gadaian tersebut adalah tidak konsisten dengan jumlah yang dituntut di dalam afidavit jawapan. Di atas alasan ini sahaja, mahkamah patut menolak isu ini atas dasar bahawa ia bukanlah suatu isu yang diterima secara spesifik di dalam afidavit (lihat ms 124G–H).

(5) Namun, walau sekalipun ia dibangkitkan, mahkamah akan menolaknya. Menurut gadaian tersebut, defendan adalah bertanggungan walaupun jumlah tersebut tidak dijamin oleh gadaian tersebut. Tiada apa-apa di dalam lampiran yang memperuntukkan bahawa jumlah prinsipal penuh tidak akan melebihi RM3,700,000. Defendan adalah peminjam dan

benefisiari pinjaman tersebut dan tidak boleh menafikan pengetahuan pinjaman penuh. Apa yang penting adalah bahawa tiada keterangan untuk menunjukkan bahawa jumlah yang dituntut adalah tidak betul. Berdasarkan autoriti, mahkamah menerima dasar plaintif untuk bergantung kepada fasal keterangan konklusif tersebut (lihat ms 124H, 125C–D, H).

(6) Mahkamah adalah berpuas hati bahawa lampiran gadaian tersebut telah memperuntukkan terma-terma dan syarat-syarat yang berkaitan di dalam jadual. Gadaian tersebut telah memperuntukkan semua jumlah yang dituntut oleh plaintif di dalam saman pemula. Di dalam keadaan-keadaan ini, 'tiada sebab di sebaliknya' telah ditunjukkan (lihat ms 127E–F).

Notes

For cases on order for sale generally, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1660–1712.

Cases referred to

Ban Hin Lee Bank Bhd v Pang Lai Hin [1999] 2 MLJ 234 (refd)
Citibank NA v Ibrahim bin Othman [1994] 1 MLJ 608 (refd)
Credit Corp (M) Bhd v Lucky Height Development Sdn Bhd [1996] 4 MLJ 556 (refd)
Kandiah Peter v Public Bank Bhd [1994] 1 MLJ 119 (folld)
Malaysian International Merchant Bankers Bhd v Chi Liung Holdings Sdn Bhd [1992] 1 MLJ 735 (refd)
Siong Holdings Sdn Bhd v Development & Commercial Bank Bhd [1997] 1 MLJ 340 (refd)

Legislation referred to

National Land Code 1965 s 256(3), Form 16D
Rules of the High Court 1980 O 59 r 3(1), O 83 r 3(3), (c), (7)

Sha Lai Guan (*Sha Lai Guan & Associates*) for the plaintiff.
Freddy Lim (*Chan Kim Poh & Co*) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

The defendant is the registered proprietor of lands held under:

(i) Title No 5871, Lot No 118 Seksyen 20, in the Town and District of Kuala Lumpur in the State of Wilayah Persekutuan, Kuala Lumpur, together with one (1) unit of five (5) storey shop-house erected

thereon bearing address No 16, 16A-D, Jalan Petaling, 50000 Kuala Lumpur; and

(ii) Titles No 17721 Lot No 533 Seksyen 56 and HS (D) 27700 Lot No PT 7 Seksyen 56, both in the Town and District of Kuala Lumpur, in the State of Wilayah Persekutuan, Kuala Lumpur, together with one (1) unit four (4) storey shop-house erected thereon bearing address No 29, Jalan Merbau, Off Jalan Kenanga, 55200 Kuala Lumpur;

('the properties').

The defendant had requested and the plaintiff had approved banking facilities to the defendant totalling RM3,700,000 to be secured over the said properties. The defendant created a first legal charge over the said properties in favour of the plaintiff to secure repayment of three facilities, namely:

(i) a term loan for RM400,000;

(ii) overdraft for RM1,800,000; and

(iii) trust receipts for RM1,500,000

making the total of RM3,700,000. The defendant agreed to repay the said sum together with interest, legal costs and other expenses accruing up to the date of full payment, upon the terms and conditions contained in the said charge. The defendant defaulted in payment to the plaintiff. The plaintiff then demanded payment by way of a demand notice dated 12 January 1999 the sum of RM3,925,216.90 made up as follows:

Facility	Total Outstanding
(i) Term loan	RM321,960.52 (inclusive of interest up to 30 December 1998)
(ii) Overdraft	RM2,065,703.38 (inclusive of interest up to 28 December 1998)
(iii) Trust receipts	RM1,534,808.00 (inclusive of interest up to 31 December 1998)
(iv) Legal fees	RM2,745.00

When there was no response the plaintiff delivered by hand the statutory notice in Form 16D of the National Land Code 1965 ('NLC') dated 8 February 1999 to the defendant for the same amount as was contained in the earlier notice of demand. Although acknowledging receipt of the said statutory notice of demand, the defendant failed to comply with same.

The plaintiff therefore now moves this court for an order for sale with consequential prayers claiming an indebtedness by the defendant as at 30 April 1999 a sum of RM4,055,691 with accrued interest. Relying on the conclusive evidence clause as contained in the charge the plaintiff prays for an order in terms of this originating summons.

Can the plaintiff include legal fees?

Referring to the plaintiff's claim for RM3,925,216.90 as contained in its notice of demand dated 12 January 1999 and in the statutory notice of demand dated 8 February 1999 the defendant argued that including a claim for legal fees amounting to RM2,745 was fatal when attempting to obtain an order for sale pursuant to s 256(3) of the NLC. The defendant relied on O 59 r 3(1) of the Rules of the High Court 1980 ('the RHC'). The said rule reads as follows:

> 3 (1) Subject to the following provisions of this Order, no party shall be entitled to recover any costs of or incidental to any proceedings from any other party to the proceedings except under an order of the Court.

The defendant based this submission relying on the decision in *Malaysian International Merchant Bankers Bhd v Chi Liung Holdings Sdn Bhd* [1992] 1 MLJ 735. The defendant in that case raised the same objection to the inclusion of the legal costs in the Form 16D Statutory Notice. Lim Beng Choon J said at p 744:

> Since s 268(1) clearly stipulates the items to which the purchase price can be utilised, the purchase price cannot be utilised to make payment to any item not specified therein. It cannot be gainsaid that the so-called 'legal fees' is not an item specified in that section.

His Lordship also relied on O 59 r 3(1) of the RHC and also said at p 744:

> For the aforementioned reasons I agree with counsel for the defendants concerning the third point of contention notwithstanding that it is stipulated in cl 11.4 of the charge annexure that the defendants must indemnify the plaintiffs for legal expenses. Such a stipulation does not give a right to the plaintiffs to claim for 'legal fees' in the charge action — they must apply separately to the court for recovery of the legal expenses which must be taxed unless the parties agree to the amount of the legal expenses.

To consider the views as expressed by the learned Judge in *Chi Liung Holdings* it is necessary to reproduce s 268(1) of the NLC which reads as follows:

> Application of purchase money
>
> (1) The purchase money arising on any sale under this Chapter shall be applied as follows —
>
> (a) firstly, in the payment of rent to the State Authority or the lessor (according as the charge was a charge of land or of a lease) and, so far as no person other than the chargor was responsible therefor, any other outgoings payable to the State Authority or any local authority;
>
> (b) secondly, in the payment of the expenses (as certified by the Registrar of the Court or Land Administrator, as the case may be) incurred in connection with the making and carrying into effect, of the order for sale;
>
> (c) thirdly, in the payment to the chargee of the total amount due under the charge at the time of the sale;

(d) fourthly, in the case of a charge to secure the payment of an annuity or other periodic sum, in accordance with any provision for the satisfaction of payments subsequently falling due included therein pursuant to paragraph (b) of sub-section (2) of section 242; and

(d) fifthly, in the payment off of subsequent charges, if any, in the order of their priority.

Subsection (c) refers to 'the total amount due under the charge at the time of the sale'. To my mind, the words 'total amount' would indicate all sums that the plaintiff had to expend as at the time of the sale and this must necessarily include the legal fees. Whilst the RHC has made provisions for costs to be taxed in respect of proceedings pursuant to an order of the court, it is now clear from the decision of the then Supreme Court in *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119 that an order for sale when made under s 256 of the NLC is not a judgment or a decree. Eusoff Chin SCJ (as his Lordship the Chief Justice then was) said at p 123:

> In our judgment, where a chargor raises issues and relies upon facts to show 'cause to the contrary' in proceedings brought by the chargee under s 256 of the Code, he is not barred from bringing a fresh action against the chargee (notwithstanding that an order for sale has been made) and raising in that action the same or similar facts and issues as those raised by him in the foreclosure proceedings. Neither res judicata nor cause of action estoppel nor issue estoppel are available answers to the chargee to meet the chargor's action.

Since pursuant to *Kandiah Peter* it is now clear that a chargee can proceed both under s 256 of the NLC and by way of a suit and that the proceedings by way of s 256 do not result in a judgment or decree but in making or refusing an order of sale, it is therefore conclusive that O 59 r 3(1) of the RHC has no place in proceedings under s 256 of the NLC.

It is therefore with respect, in the light of the recent decision in *Kandiah Peter*, that I decline to adopt the reasoning of Lim Beng Choon J in the *Chi Liung Holdings* case. The said legal expenses are therefore not expenses within the ambit of O 59 r 3(1) of the RHC since proceedings pursuant to section 256 of the NLC are not proceedings within the meaning of O 59 r 3(1) and also considering the fact that these expenses amounting to RM2,745 had been incurred long before the filing of the originating summons. In any case the said sum was included in the notice of demand dated 12 January 1999 and the defendant had failed to make any challenge at that stage even to the amount. Further, in its affidavit in reply, the defendant never challenged the principle on which the plaintiff was claiming the legal fees. The defendant merely stated that the plaintiff had not explained how it had arrived at the total figure claimed. That is all. In the circumstances, it is my judgment that both on principle and on the law the plaintiff is entitled to include its claim for legal costs incurred prior to the filing of the originating summons in a claim made pursuant to s 256 of the NLC.

Service of the notice of demand

The defendant contends that the notice of demand of the plaintiff dated 12 January 1999 has not been duly served. Section 7.18 of the annexure to the charge reads as follows:

> SECTION 7.18 SERVICE OF LEGAL PROCESS
>
> (a) The service of any Legal Process may be given by prepaid registered post sent to the respective Address for Service of the parties hereto and such Legal Process shall be deemed to have been duly served after the expiration of five (5) days from the date it is posted and if delivered by hand, on the day it was delivered.
>
> (b) No change in the Address for Service howsoever brought about shall be effective or binding on either party unless that party has given to the other actual notice of the change of Address of Service and nothing done in reliance on s 15.02(a) shall be affected or prejudiced by any subsequent change in the Address of Service over which the other party has no actual knowledge of at the time the act or thing was done or carried out.

It is the defendant's case that 'legal process' does not include a demand notice under the charge and that therefore service ought to have been effected by hand, and not by way of AR Registered post and by way of Certificate of Posting as was done in this case. It must be noted that whilst the defendant is not denying that it did not receive the said notice of demand, its complaint is that the proper mode of service, that is, service by hand, was not followed. The defendant also argued that since the plaintiff had chosen to send the notice by AR Registered post and not by 'prepaid registered post' there is a heavier burden on the plaintiff to show that the AR Card had been duly acknowledged and returned by the defendant.

The answer to this issue is very simple. It is my judgment that a notice of demand is not a prerequisite to a charge action. In fact s 302 of the annexure to the charge states that the onus is on the defendant to pay to the chargee the facility, interest thereon and all other monies whether formally demanded or not. Therefore whether the notice of demand was sent by ordinary post or otherwise or even if the defendant did not even receive it, is of no consequence. The onus is on the defendant to pay, whether demand is made or not, when the sums fall due for payment.

Service of statutory notice of demand (Form 16D)

Although raised as an issue in the affidavit the defendant abandoned this at submission.

Order 83 of the Rules of the High Court

The defendant argued that the plaintiff's application should be dismissed for non-compliance with O 83 r 3 of the RHC. The said relevant rules relied on by the defendant are as follows:

3 (1) The affidavit in support of the originating summons by which an action to which this rule applies is begun must comply with the following provisions of this rule. A

This rule applies to a charge action begun by originating summons in which the plaintiff is the chargee and claims delivery of possession or payment of moneys secured by the charge or both. B

...

(3) Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the Court in any case or class otherwise directs, the state of the account between the chargor and chargee with particulars of — C

(a) the amount of the advance;
(b) the amount of the repayments;

(c) the amount of any interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit; and D

(d) the amount remaining due under the charge.

(4) Where the plaintiff claims delivery of possession, the affidavit must give particulars of every person who to the best of the plaintiff's knowledge is in possession of the charged property. E

...

(6) Where the plaintiff claims payment of moneys secured by the charge, the affidavit must prove that the money is due and payable and give the particulars mentioned in paragraph (3).

(7) Where the plaintiff's claim includes a claim for interest to judgment, the affidavit must state the amount of a day's interest. F

It was the defendant's case that having merely stated the amount outstanding, namely, RM4,055,691, the plaintiff had failed to provide a breakdown of the amount outstanding and thereby breaching O 83 r 3(3). The defendant pointed out that even the further affidavit did not disclose G the amount of interest or instalments due at the date of issuance of the originating summons and the date of filing of the further affidavit, thereby further contravening O 83 r 3(3)(c). The further affidavit merely stated the amount of interest calculated daily from 29 September 1999. The defendant argued that whilst the plaintiff has stated the amount of a day's interest as at 29 September 1999 the plaintiff had failed to state the amount H of daily interest pursuant to O 83 r 3(7) as of the date of the first affidavit filed in support of the application. In support of all these propositions the defendant relied heavily upon the decision of Shankar J (as he then was) in *Citibank NA v Ibrahim bin Othman* [1994] 1 MLJ 608 wherein whilst referring to the same sub-rules of O 83 the learned judge had said at p 613: I

> ... I think it was incumbent on the plaintiff to provide the statutory particulars in the first affidavit.

A and further he said at p 616 as follows:

> The lesson for all concerned is that they must get the first affidavit right or face the consequences in terms of costs or even a dismissal of the proceedings if the situation has not been put right by the time the order is made.

B In the *Citibank NA*, the particulars of accounts were not given by the bank in spite of four affidavits having been filed, up to the date of the hearing. Further Citibank had varied the rate of interest, and although the defendant had challenged the rate of interest charged by the bank, and had requested for particulars of the variation, Citibank had failed to give the required details. In the case before me the plaintiff has clearly given the details of the C amount claimed as at 30 April 1999 as set out in his main affidavit in support of the application. The exact amounts due as at the date of the originating summons, that is, 29 June 1999, and as at the date of the hearing of the originating summons, that is, 29 September 1999, are clearly set out in the further affidavit (encl 5). In its reply affidavit the defendant did not D give any particulars of whichever sum it was challenging nor did the defendant give any evidence whatsoever that the sums claimed by the plaintiff were wrong in any material particular. Referring back to the case of *Citibank NA* Shankar J also commented at p 615 as follows:

> ... It is to be noted that O 83 r 3(3) gives the court the power to dispense with E the statutory particulars 'in any case or class'. More than one affidavit can and is usually filed in this type of case because invariably the matter cannot be disposed of on the first return date (eg for non-service) and at least one further affidavit is always required to state the total amount due on the date of the order. Provided evidence of the correct amount due has been put before the final hearing, the court has the power to dispense some omission to fulfil the rules to the letter, but only if no real prejudice will thereby result to the F defendant.

It is therefore obvious that the defendant is not correct in suggesting that all the statutory particulars must be included in the first affidavit in respect of foreclosures. In the *Citibank NA* case the learned judge also held at p 615 that:

G

> ... A bare denial of a debt was never enough. The chargor also has an onus if he denies the amount claimed to say how much he admits owing. In this kind of case, the dismissal of the application for non-compliance with some aspect of the rules does not extinguish the debt. The chargee can start afresh but there will then be additional costs, interest and delay.

H

Having perused the further affidavit filed by the plaintiff, I find that the plaintiff has given particulars of:

(i) the amount of the advance;

I (ii) the amount repaid;

(iii) the amount due as at 29 June 1999, that is, the date of the originating summons and of the supporting affidavit;

(iv) the rates of interest chargeable; A

(v) the rate of interest per day; and

(vi) the amount due as at 29 September 1999, that is, the date of the hearing.

I am therefore satisfied that there has been sufficient compliance with the requirement of O 83 r 3 of the RHC. B

Charge inconsistent with the amount claimed

The defendant next argued that since the total for the facilities granted to the defendant amounted to RM3,875,000 and since the amount stated in the charge was only RM3,700,000 and since s 7.21 of the annexure to the charge stated that 'this charge and loan agreement are instruments employed in one transaction to secure the sum of RM3,700,000 only' the plaintiff, by its demand for RM3,875,000 was in fact asking for an extra RM125,000 (ought to have been RM175,000) not agreed upon in the charge and that since no explanation has been proffered nor documents exhibited to explain the excess, this clearly amounted to an error on the part of the plaintiff giving grounds for 'cause to the contrary'. The defendant also pointed out that it was not in order for the plaintiff to rely upon the 'conclusive evidence' clause in the face of such manifest error and in support relied upon an earlier decision of mine in the case of *Credit Corp (M) Bhd v Lucky Height Development Sdn Bhd* [1996] 4 MLJ 556 where I said at p 564 as follows: C D E

> ... I hold that no claimant should be allowed to hide behind a conclusive evidence clause and be allowed to make unlawful demands against its borrowers or guarantors. F

Further down the same page I had this to say:

> ... I hold that the presence of a conclusive evidence clause per se, cannot prevent the guarantors from questioning the correctness or otherwise of the account sought to be produced as conclusive evidence against them ... G

The plaintiff pointed out that nowhere in its affidavit in reply did the defendant raise the issue now raised in submission that the charge is inconsistent with the amount claimed. In the circumstances, it was urged upon me to reject this argument. There is force in this argument. On this ground alone I ought to reject this issue on the basis that it was not specifically taken as an issue in the affidavit. H

However, even if it was raised I would have rejected it. It is relevant to reproduce s 7.06(2) of the annexure to the charge which reads as follows:

> (2) It is hereby expressly agreed and declared that unless the Chargee otherwise agrees, the Chargor shall not be entitled to redeem or require the release or discharge of any security given by the Chargor to the Chargee and whether given now or hereafter except on payment by the I

> Chargor of not only all moneys referred to herein but also all moneys whatsoever and howsoever owing or payable or due from the Chargor to the Chargee under any other account whether as borrower, guarantor, assignor or howsoever or otherwise with the Chargee, and without prejudice to the generality of the foregoing, it is hereby expressly agreed and declared that unless the Chargee otherwise agrees in writing the Charge created herein shall not be discharged except on payment:
>
> (a) of all the Monies Hereby Secured; and
>
> (b) of all other moneys due and owing to the Chargee by the Borrower and/or Chargor under any account with the Chargee whether or not and howsoever secured; and ... .

It is clear therefore that pursuant to sub-cl (b) the defendant is liable even if the amount is not secured by the charge. There is nothing in the annexure which provides that the total principal sum shall not exceed RM3,700,000. The defendant herein is the borrower and the beneficiary of the loan and cannot deny knowledge of the total loan. In fact, the defendant has utilised the same by way of overdraft facilities, had notice of the said amount and further, did not deny receiving the total sum in its affidavit in reply. What is important is that there is no evidence to show that the amount claimed is incorrect.

In respect of the defendant's reliance upon my earlier decision in *Credit Corp (M) Bhd*, I must point out that in *Credit Corp (M) Bhd* the plaintiff had varied the rate of interest and admitted that it had not given notice of the same to the defendants when it was expressly provided for under the loan agreement and the annexure to the charge that the plaintiff ought to do so. In fact, in *Siong Holdings Sdn Bhd v Development & Commercial Bank Bhd* [1997] 1 MLJ 340 where the main issue was that the court ought not to rely on the 'conclusive evidence' clause by reason of the fact that the guarantor was protesting that it had no knowledge of the details of the account, the Court of Appeal holding that it was bound by the principle in *Kandiah Peter* had held that the conclusive evidence clause was applicable and therefore there was no need for the respondent to prove the amount owed by the appellant. The Court of Appeal went on to hold that the Court hearing the application for foreclosure does not make, or in any event ought not to make, any adjudication upon any substantive issue. All the respondent had to show in order to obtain an order for sale in foreclosure proceedings was the fact of the inability of the appellant to settle the loan. Likewise, the alleged incorrect account of the respondent was also irrelevant to the case. If, as alleged by the respondent, there was a discrepancy in the conclusive evidence clause, it could only be resolved in a separate claim. To go outside the principle of the conclusive evidence clause was to negate the principle in *Kandiah*'s case. Bound as I am by the decisions of both the superior courts on this issue, I accept the plaintiff's reliance upon the conclusive evidence clause.

The defendant also argued that since the charge is inconsistent with the amount claimed by the plaintiff, the notice of demand dated 12 January 1999 and the statutory notice dated 8 February 1999 issued by the plaintiff

are invalid. As I have already held the argument raised by the plaintiff on this score unacceptable, there is therefore no question of the two notices being invalid.

Non-disclosure of the loan agreement

The defendant argued that by not exhibiting the loan agreement to any of the affidavits in support of this application the plaintiff had failed to establish the basis for the claim. Pointing out that s 7.21 of the annexure states that 'this charge and the loan agreement are instruments employed in one transaction to secure the sum of' (RM3,700,000) and that 'for the purpose of the said section the loan agreement is deemed to be the principal or primary instrument ...', the defendant thus emphasised the need for disclosing the said loan agreement and contended that the failure to exhibit the same was fatal to this claim.

The plaintiff relied on one of my own decisions in *Ban Hin Lee Bank Bhd v Pang Lai Hin* [1999] 2 MLJ 234. In that case I had held that the plaintiff had failed to show proof that it was entitled to charge interest at 2.3% pa above its base lending rate of 12.25%pa because although the plaintiff had exhibited its letter of offer, this alone was not sufficient since the charge specifically had referred to the facilities agreement and not to the letter of offer. In that case I had held that the defendant had succeeded in showing a 'cause to the contrary'. The defendant asked me to apply the same reasoning to this case.

In respect of my decision in the *Ban Hin Lee Bank*, case the facts therein were different in that, inter alia:

(i) the charge and the annexure did not provide for the imposition of any interest nor did it state the interest payable;

(ii) the plaintiff relied on a facilities agreement for imposition of the interests which said facilities agreement was not exhibited; and

(iii) there was an error in the statutory notice.

For all these reasons, I had found that the defendant had raised sufficient 'cause to the contrary' and had therefore dismissed the application.

In any case, it is clear that the defendant had not considered s 1.02 of the annexure which reads as follows:

> SECTION 1.02 Loan Agreement incorporated into this Charge
>
> All the provisions of the Loan Agreement are, whether repeated herein or not, incorporated into and form part of this Charge ... in the event of any conflict or discrepancy between the provisions of the Loan Agreement and any provisions of this Charge, the provision of this Charge shall prevail for the purposes of interpretation and enforcement of this Charge.

Further s 2.03 is also relevant. It reads as follows:

> SECTION 2.03 Execution of Charge under the National Land Code 1965
>
> Pursuant to the Loan Agreement, it is agreed, inter alia, that the principle sum, interest thereon and all other moneys owing and payable by the Borrower shall be secured by this Charge.

This application is for an order for sale pursuant to the terms and conditions of the charge duly registered under the NLC.

In respect of the defendant's reference to s 7.21 of the annexure, it is unfortunate that the defendant stopped short of the quote and did not state the rest of s 7.21. The entire s 7.21 reads as follows:

> SECTION 7.21 Principal and Secondary Instruments
>
> It Is Hereby Agreed And Declared That this Charge and the Loan Agreement are instruments employed in one transaction to secure the sum of Ringgit Malaysia THREE MILLION AND SEVEN HUNDRED THOUSAND (RM3,700,000-00) only within the meaning of s 4(3) of the Stamp Act 1949 (Consolidated and Revised 1989) of the States of Malaysia and for the purpose of the said section the Loan Agreement is deemed to be the principal or primary instrument and this Charge the auxiliary or secondary instrument.

It is clear, therefore, that s 7.21 was put in for stamp duty purposes only and ought not to be given the interpretation ascribed to it by the defendant.

I am satisfied that the annexure to the charge has provided for all the relevant terms and conditions in the schedule. The charge has provided for all the sums claimed by the plaintiff in this originating summons. In the circumstances, no 'cause to the contrary' has been shown and I therefore grant an order in terms as follows:

(1) That the properties held by the defendant under:

(i) Title No 5871, Lot No 118 Seksyen 20, in the Town and District of Kuala Lumpur in the State of Wilayah Persekutuan, Kuala Lumpur, together with one (1) unit of five (5) storey shop-house erected thereon bearing address No 16, 16A-D, Jalan Petaling, 50000 Kuala Lumpur; and

(ii) Titles No 17721 Lot No 533 Seksyen 56 and H.S.(D) 27700 Lot No PT 7 Seksyen 56, both in the Town and District of Kuala Lumpur, in the State of Wilayah Persekutuan, Kuala Lumpur, together with one (1) unit four (4) storey shop-house erected thereon bearing address No 29, Jalan Merbau, Off Jalan Kenanga, 55200 Kuala Lumpur;

(the said properties) and charged to the plaintiff be sold by public auction to enable the plaintiff to recover all sums due and owing to the plaintiff together with interest.

(2) That the said auction be held on 23 March 2000.

I also grant the rest of the consequential orders prayed for under items (3) to (13) of encl 1.

Plaintiff's application allowed.

Reported by Jafisah Jaafar